



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION AT SANTA ANA
BY *[Signature]* DEPUTY

EASTERN DIVISION

TOM J. GARNER, JR.,) Case No. EDCV 11-1552-VAP (MLG)
Plaintiff,)
v.) MEMORANDUM OPINION AND ORDER
STATE OF CALIFORNIA, et al.,) DISMISSING COMPLAINT FOR FAILURE
Defendants.) TO PROSECUTE

I. Facts and Procedural Background

17 Plaintiff Tom J. Garner, Jr. is a prisoner at the Kern Valley
18 State Prison. At the time of the events giving rise to this cause of
19 action, he was a pre-trial detainee at the Southwest Detention
20 Facility in Murrieta, California.

21 Plaintiff filed this pro se civil rights complaint, pursuant to
22 42 U.S.C. § 1983, on October 6, 2011. He named the State of
23 California, Nurse Tracy and Deputy Duffy as defendants. The complaint
24 alleges that on January 17, 2011, Plaintiff went into the pill
25 dispensing line at the jail to complain of diarrhea, chest pains, flu
26 symptoms and shortness of breath. Plaintiff claims that Tracy failed
27 to assist him, claiming that she was dispensing pills to other
28 inmates and that Duffy also refused to provide him with medical

1 assistance.

2 Plaintiff claims that he saw a doctor seven days later, who
3 diagnosed Plaintiff with a cold in his chest, and prescribed an
4 asthma inhaler to treat a chronic asthma condition. Plaintiff claims
5 he filed several grievances, which were denied because it was
6 determined that Plaintiff had only been suffering from a head cold.
7 Plaintiff contends that the individual defendants acted negligently
8 and unprofessionally.

9 On October 12, 2011, Magistrate Judge Marc L. Goldman dismissed
10 the complaint with leave to amend. In doing so, it was found that
11 plaintiff had failed to state a claim upon which relief may be
12 granted as to his allegations of deliberate indifference to his
13 serious medical needs, and that any action against the State of
14 California was barred by the Eleventh Amendment. Plaintiff was
15 instructed to file a first amended complaint remedying the identified
16 deficiencies no later than November 9, 2011. Plaintiff was explicitly
17 informed that failure to do so would result in dismissal of the
18 action without prejudice. Plaintiff has not filed a first amended
19 complaint in the time allowed. Accordingly, this action will be
20 dismissed without prejudice for failure to prosecute.

21 Federal courts possess the discretionary authority to dismiss
22 an action based on a plaintiff's failure to diligently prosecute or
23 comply with a court order. Fed.R.Civ.P. 41(b); Local Rule 12.1. See
24 *Link v. Wabash R.R. Co.*, 370 U.S. 626, 629-630 (1962). "Dismissal is
25 a harsh penalty and is to be imposed only in extreme circumstances."
26 *Henderson v. Duncan*, 779 F.2d 1421, 1423 (9th Cir. 1986). The Court
27 is required to weigh the following factors in determining whether to
28 dismiss a case for lack of prosecution: "(1) the public's interest

1 in expeditious resolution of litigation; (2) the court's need to
2 manage its docket; (3) the risk of prejudice to the defendants; (4)
3 the public policy favoring disposition of cases on their merits; and
4 (5) the availability of less drastic sanctions." *Omstead v. Dell,*
5 *Inc*, 594 F.3d 1081, 1084 (9th Cir. 2010); *In re Eisen*, 31 F.3d 1447,
6 1451 (9th Cir. 1994) (citing *Henderson*, 779 F.2d at 1423).

7 In weighing these factors, the court concludes that dismissal
8 is appropriate in this case. Plaintiff has been afforded two
9 opportunities to state a viable cause of action. Here, the public's
10 interest in the expeditious resolution of litigation and the court's
11 interest in managing its docket weighs in favor of dismissal. Given
12 Plaintiff's failure to comply with the court's order, dismissal would
13 not undermine the public policy favoring disposition of cases on the
14 merits. In addition, there is no identifiable risk of prejudice to
15 Defendants.

16 Accordingly, it is ORDERED that this action be dismissed without
17 prejudice for failure to prosecute.

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19 Dated: November 22, 2011

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24 Presented By:



25
26 Marc L. Goldman
27 United States Magistrate Judge
28

Virginia A. Phillips
Virginia A. Phillips
United States District Judge